THE NATURE OF THE FEDERAL STATE.

In reviewing the history of Europe we find that the prevailing political organization has been successively Municipal, Imperial, Feudal, Monarchical and Parliamentary. Each in turn has been considered final and permanent, and each, except the last, has had its day, and gone the way of all the earth. And this last form, the Parliamentary, is that to prove an exception to the rule? The events of the recent past and the circumstances of to-day return no uncertain answer. Parliamentary government has been weighed in the balance and found wanting. It is unstable; for the government, *i. e.*, the Cabinet, may be changed every day, and that upon the most frivolous pretexts. It puts a premium on demagogery, for the demagogues have but to combine and upset the Cabinet, and their portfolio-hunger is assuaged. And finally, however disguised, the essence of Parliamentary government is the omnipotence of one chamber; a power that constantly tends to become capricious, insolent, tyrannical and incompatible with the rights and safety of individuals or minorities. Of this fact the experience of France is abundant proof. Hence it is that whereas a century ago Parliamentary government was the ideal of the nations, to-day it is a tacitly confessed failure, wherever imported, and is distrusted and feared by conservative men even in England, the land of its birth. This discredit, moreover, attaches not only to Parliamentary government, but also and still more, to that form of state of which Parliamentary government is the most perfect organ; namely, the centralized simple state. It is seen that such a State acting through such a government is, and necessarily must be, a despotism; perhaps well-meaning, but none the less a despotism, and equally despotic whether autocratic or

democratic, whether the ruler be one man, or half the people plus one man; for despotism consists not in the possession of governmental power by a larger or smaller number of men, but in the absolute and unlimited nature and extent of such power. There can be no security against despotism but limitations upon the government; and no effective limitations upon the government, but such as are imposed by a higher power, the State, and enforced by separate and co-ordinate organs of government created by the State and participating in the action of the general government. But this is the Federal State, a form long considered a transition stage between the league of States and the simple State, but now recognized—in other countries at least—as the most interesting and significant product of institutional development.

Its importance is proved by its success. In a century the new form has overspread the earth. 1787 in the United States; 1848 and 1874 in Switzerland; 1866 to 1870 in Germany; 1867 in Canada and Mexico; 1889 in Brazil; 1891 in Australasia—these dates record a progress unchecked by reverse, unparalleled in rapidity and extent. Federalism has succeeded in conditions the most diverse; here knitting scattered colonies of a kindred race into a nation equally strong and free; there forming hostile races, tongues and creeds into compact and vigorous States. It is strong and flexible. No shock has severed its well-knit meshes, and nations the most unlike move with equal freedom in its enveloping folds. The whole drift of the political world is toward Federalism to-day, as it was toward Feudalism in the tenth century, and Centralism in the fifteenth. The time may not be far distant when a centralized simple State will be as great an anachronism as a mail-clad knight in a modern army.

Like all political forms, the Federal State is the offspring of necessity, yet it is more than a chance political expedient. It did and could originate only as a compromise between

the desire to unite and the desire not to unite; yet it both develops nationality and prevents centralization. It is a new equilibrium, the maintenance of which is confided to the States as against open centralization, to the general government as against open decentralization, and to the judiciary as against covert disturbances of any sort.

This interpretation will, it is believed, be confirmed by an examination of the origin and constitution of the four chief Federal States.

I. ORIGINS.

The Canadian Union was the work of one external sovereignty. A congress of delegates appointed by the Provincial Legislatures framed the desired Constitution, which was then (1867) enacted *en bloc*, as an ordinary statute, by the British Parliament.*

In Switzerland and the United States, the ordaining sovereignty was one and internal. Previous to 1848, the Cantons are said to have been separately sovereign.† The only central authority was the Diet, consisting of one instructed vote from each Canton. But unanimity was not required for decision, consequently a Canton could be bound against its will, and coërced by arms if it resisted—as occurred in the Sonderbund war in 1847. Thus Laband's conception of the German Empire‡ exactly fits the Switzerland of that date: sovereignty rested in the Cantons, not individually, but collectively. There were not as many sovereignties as Cantons, but one sovereignty, of which the Cantons were co-bearers (*Mitträger*). To the Cantons collectively the Cantons individually were subject; just as each Roman Senator was subject as an individual to the Senate as a whole. Following the Sonderbund war a committee of the Diet drafted the new Constitution; the Diet itself then revised and passed it. When submitted to the

* Bourinot, "Federal Government in Canada," p. 25.
† Hart, "Introduction to Federal Government," p. 65.
‡ Laband, "*Das Staatsrecht des Deutschen Reiches*" (1876), Vol. I., pp. 89, 92.

Cantons for approval, fifteen and one-half Cantons accepted, six and one-half rejected it. The Constitution thereupon went into effect for all alike.* The sovereignty in the old Confederation, therefore, decreed the new Federal organization. No absolutely new State was created, but a rudimentary exchanged for a well-developed form.

The same was true in America, but is not so easily seen. The traditional view regards the individual States as separately sovereign under the Confederation. Article II. declares: "Each State retains its sovereignty, freedom and independence . . . ." But words cannot obliterate facts. The States could not "retain" what they had never possessed. They had always been subject to a political superior.† First, to England; secondly, to the Continental Congress, a revolutionary body, hence *de facto* sovereign; and thirdly, under the Confederation, each State individually was subject to the States collectively. In the American, as in the Swiss Confederation, sovereignty was one, and the States were its co-bearers; each as an individual was subject to the body as a whole. The proof is simple. Unanimity was not required, hence a State could be bound against its will. Also, the most essential powers of sovereignty—peace and war, foreign affairs, etc.—belonged to the States collectively, not individually. Therefore, the separate States could not be individually sovereign. *De facto*, they might have been so, through the inability of the collective body to enforce its powers, but not legally, and the question at issue is solely one of law. But unanimity was required for amendment; therefore on this point each State was positively impotent, negatively sovereign. It could not amend the Articles of Confederation even in a particular affecting only itself, but could prevent amendment even in particulars affecting only others. Such a contradictory position was intolerable, but legally there was no escape. Revolution was

* Dubs, "*Das Oeffentliche Recht der Schweiz, Eidgenossen*," (1878).

† Cooley, "General Principles of Constitutional Law" (1880), p. 17.

the only recourse. The Constitutional Convention exceeded its instructions in drafting a new Constitution, in providing that the assent of nine States should be sufficient for its adoption and in "calling for the plebiscite over the heads of Congress and the Legislatures." But it did not exercise constituent powers; it was not sovereign. In the United States, as in Canada, the Constitutional Assembly merely proposed; the sovereign enacted. For until ratified by the States, the report of the Philadelphia Convention carried no more legal authority than the resolutions of a mass meeting. The States gave it the *vis legis;* their sanction, either tacit or expressed, made valid its unauthorized acts. Not the Convention, therefore, but the States, carried through the Constitutional Revolution. That consisted in the assumption by the usual majority, viz., nine, of the same sovereign right as to amendment that they already possessed as to the other subjects within the collective competence. This assumption contravened the negative sovereignty over amendment legally possessed by the other States; hence it was merely *de facto* sovereignty, exercised in violation of law, but it became *de jure* by the acquiescence of the other States in this assumption. Acceptance by the majority specified in the new Constitution would, therefore, have made that instrument binding upon all the States, as it did in Switzerland, but for the limitation to "the States so ratifying." This clause was inserted as a matter of policy, not of law. And despite this limitation, preparations were made, as is well known, to compel the adhesion of the other States, a fate they escaped only by ratifying the Constitution voluntarily.

In Germany, the situation was different in that the contracting States had been and still were separately sovereign. August 18, 1866, the North German States provided by treaty for the founding of a Federal State within one year; the Constitution to be drafted by a Conference of Envoys at Berlin, and passed upon by a Reichstag elected on the basis

of the Frankfort election law. These provisions of the treaty were then enacted by the State legislatures as State law. State law they would have been without special enactment, since the August treaties rested upon State authority; State law they had to be, if law at all, since law requires a law giver, and only the States then legally existed. Both Reichstag and Conference therefore rested equally on State authority. The Conference sat December 15, 1866, to February 7, 1867.* Its draft was submitted to the Reichstag February 24, by the King of Prussia, in the name of the associated governments. The Reichstag proposed amendments; these were accepted by the Conference. Both then dissolved and disappeared. The bodies created by State authority had done their work, but the States were not legally bound by it, any more than the British Parliament was legally bound by the recommendations of the Canadian Constitutional Congress. The States did ratify the report of their agents, and fixed July 1, 1867, as the day for it to go into operation. But legally they could as well have rejected it. The lapse of the specified year would then have restored the *status quo ante* August 18, 1866. If, therefore, the criterion of the existence of a new State be the existence of a new political authority, setting a limit to older authorities, then no new State existed prior to the ratification of the Constitution by all the States.

It is indeed unquestionable that the German nation already existed, *i. e.*, that the German people were conscious of common interests, feelings and aspirations. It is equally unquestionable that such feelings could not but result in new political relations, and that in an historical and dynamical sense, the nation did, as a matter of fact, employ the States as instruments in the creation of the new State. But it is generally agreed that a nation is not a State until politically organized, and a State cannot be said to give itself political organization, because such organization is pre-requisite to its being a State. To argue the contrary is to say that a thing

* Laband, "*Das Staatsrecht des Deutschen Reiches*," Vol. I., p. 20-21.

can both exist and not exist at the same time. Thus the same difficulty still confronts us; namely, how is it possible to pass from the existence of one nation and twenty odd States, to one nation and one State? In a legal sense, whatever is done through a State is done by that State; hence, the State created by the nation acting through the States was, nevertheless, from a legal point of view, created by those States. From this conclusion there is no escape. The nation could not act except through those individuals who constituted the nation. But these were in whole or in part the same as the people of the States; therefore, to say that the nation acted through the States is only to say that the people, or part of the people of the States acted through the States. But so they do in every State action; this is State action. And finally, the quality of State action, as State action, is wholly independent of the motive inducing to such action. Therefore, State action is none the less State action because the motive leading to it was the desire of part or all the people to express in political form the nationality of which they were conscious.

This conclusion is therefore irresistible: the North German Confederation was legally created by the States. Yet the later redaction of the Federal Constitution by the general government* proves that the Constitution then rested upon Federal authority.

This interpretation, which springs naturally from the facts themselves, is nevertheless rejected by an influential school of writers on the ground that States cannot create a State and cannot divest themselves of their own sovereignty. But this denial raises more difficulties than it removes.

If, as is asserted by this school, no State, however strong, can impose obligations upon another State, however weak, and if, as is also asserted, no State, however willing, can surrender its own sovereignty or subject itself to the will of any other State, the question arises, how can States ever

* Laband, *op. cit.*, § 5.

lose their sovereignty or new States be formed? Athens and Rome must still be sovereign, and the United States of America still subject to England. This *reductio ad absurdum* is unavoidable upon a view which starts by denying the only two possible ways in which an old sovereignty may perish, or a new sovereignty come into existence. The fact, then, seems to be that any State which parts with its sovereignty by becoming subject to another, either voluntarily or by compulsion, is legally bound to continue that relation, *i. e.*, is bound by the will of a political superior. Its position after subjection is identical and its right of secession equal, whether such subjection be voluntary or involuntary; for in either case it has no legal right whatever, but merely the right of might—the right of revolution.

Granting this, the paradox is solved: the creation of a Federal State by the previously existing States, and the Federal origin of its Constitution, both become intelligible.

The peoples constituting the contracting States separately willed to form themselves into a single State, and then, collectively, as constituting the new State, ordained a Constitution therefor: the two volitions, logically distinct but coincident in time, being expressed by one and the same act; viz., ratification of the Constitution.* By the one volition, the people constituting each State surrendered their sovereignty to the collective people; by the other, the collective people, so constituted, delegated to each State the exercise of certain powers.† By the former volition, the old States

* "The British North America Act first consolidated the four provinces into one body politic, the Dominion, then redistributed this Dominion into four provinces."

"We the people of the United States—do ordain and establish this Constitution."

Jellinek, "*Lehre von den Staatenverbindungen*" (1882), p. 265, "*Der Act der Staatsschöpfung ist daher hier identisch mit dem Act der Verfassungsschöpfung.*"

† Laband, I., 83. "*Nicht der Einzelstaat, nicht der Gesammtstaat sind Staaten schlechthin, sie sind nur nach der Weise von Staaten organisirte und handelnde politische Gemeinwesen. Staat schlechthin ist nur der Bundesstaat als die Totalität beider.*"

Laband, I., 84. "*Es erscheinen die Einzelstaaten als Einrichtungen des Bundesstaats, als Theile seiner Organization.*"

Lincoln (First Message, 1861), "The States have their status in the Union, and they have no other legal status. . . . Our States have neither more nor less

were annihilated; by the latter volition, the States were re-created, and the central government created, as organs of the Federal State. Both the States and the central government therefore rest upon the same ultimate authority—the Federal State, the one sovereign people. By it they were created; by it they may be abolished: but as regards each other, they form an "Indestructible Union of indestructible States." Neither the States nor the central government possesses authority over the other. The Constitution is their common charter of life and power. In that is their legal status, and they have none other whatever. Acting *intra vires*, their acts are equally those of the Federal State; acting *ultra vires*, their acts are equally *ipso facto* void. A seceded State is therefore not a State, any more than a usurping central government would be a legal government. Not legally existing except in and through the Constitution, the instant a State got outside of that, it would be legally annihilated. But the fact is, a State cannot secede and it cannot rebel. The people constituting it may, but they do so as a mob, not as a State. For whatever a State attempts contrary to the Constitution is not State action but individual action. Its legislators in voting and its officers in enforcing laws *ultra vires*, act in a private, not a public capacity; hence they are responsible as individuals for such action.* The alleged government of an alleged seceded State is merely a revolutionary junta ruling *de facto* over a mob of revolted individuals between whom and the Federal State there can exist no law but that of war.

This account of the origin and nature of the Federal State is believed to both explain the present political condition of the United States, Germany, and Switzerland, and to harmonize with the admitted facts of history. And it receives unexpected confirmation from Canada, which at first sight seems an

power than that reserved to them in the Union by the Constitution. . . . The Union is older than any of the States, and, in fact, created them as States."

* Webster, Reply to Hayne.

exception. In Canada, sovereignty did not reside in the provinces either separately or collectively, hence they could neither unite, nor ordain a Constitution for the Union. The sovereign British Parliament decreed their union, then decreed a Constitution by which a central government was created, the provinces re-created, and the exercise of certain powers delegated to each; both acts being expressed by the enactment of the Constitution. This illustrates admirably the true relation of sovereign and subject in the Federal State. *For what the sovereign British Parliament is to the Canadian government and the provinces, that the sovereign Federal State, the one people, is to the Central government and the States; their creator, their upholder, their possible destroyer.*

This sharp distinction, in the case of Canada, between the State, represented by the British Parliament, and the central government at Ottawa, brings clearly to light what is everywhere the heart of the Federalism, namely, the radical difference between the relation of the States in a Federal State, and of Communes in a simple State, to the central government. Communes are created by the government through statute law; States are created by the Federal State through the Constitution. Communes are consequently subject to abolition at any time by the government; the States are as indestructible by the government as the government by the States, because neither is the creature of the other, but both alike are creatures of a common creator. The common identification of central government and Federal State is therefore not only false, but dangerous. It at once misses the whole meaning of Federalism and prepares its destruction.

It now remains only to determine from an examination of the several constitutions, to what extent this principle is recognized in practice, and how the mutual independence of the States and the general government is maintained and conflicts prevented. For this is the crucial test that determines the success or failure of the whole system.

II. CONSTITUTIONS.

In order to facilitate comparison between the constitutions, each department will be traced through all the constitutions before the next department is taken up.

I. LEGISLATURE.—The German Imperial Legislature is bi-cameral, both Houses possessing equal initiative and control as regards legislation. The *vis legis* therefore comes from neither alone, but from their agreement; and the formal command from the Emperor, in the name of the Empire.* Consequently, neither House is sovereign, nor the exclusive organ of sovereignty. The supreme power resides in the State, *i. e.*, in one collective people. The Constitution is their decree; the Reichstag, Bundesrath, and Emperor† are co-ordinate organs of their sovereignty. The Reichstag represents the people as one people; the Bundesrath, as States; so far they conform to the Federal principle. But while the former is uninstructed, hence truly representative, the latter is instructed, hence a pure democracy, composed of the States considered as units: the one represents the whole people, the other is the States. The Bundesrath is thus a rudimentary form, Confederate rather than Federal.

The competence of the Imperial Legislature is ill-defined. In many cases it legislates concurrently with the States; in others, it legislates while the States administer. In general, the tendency is to make States and central government into one organ instead of two. Article 4, as amended December 20, 1873, grants to the Houses power over the whole of civil and criminal law and legal procedure, besides the ordinary subjects.

The Imperial revenue is derived from: (1) Imperial property, institutions, etc.; (2) the customs duties; (3) excise on salt, tobacco, sugar and syrup; also, eighty-five

* See Constitution of the German Empire, Introductory Law.

† Zorn, "*Das Staatsrecht des Deutschen Reiches*," I., 63.

"*Der Kaiser ist nicht Träger der Reichssouveränetät, sondern als König von Preussen Mitträger derselben, als Kaiser Organ derselben.*"

per cent net of that on brandy and beer; (4) requisitions on the States.*

The Stamp Tax, nominally Imperial, goes to the States, as also fifteen per cent of the liquor tax. These facts suffice to show that German Federalism is on dangerous ground. Centralized legislation, State administration and financial interdependence, all show tendencies hostile to Federalism. Germany may well be, as Treitschke insists, "*Ein werdender Einheitsstaat*"—(Developing into a simple State). Amendments pass as ordinary laws, but are defeated by fourteen votes contra in the Bundesrath. They are therefore decreed by the Federal State acting through: (1) a majority of the Reichstag, *i. e.*, of the people as a whole; (2) a three-fourths-plus majority of the States, *i. e.*, of the people acting as States.

The Canadian Legislature is nominally bi-cameral, but actually uni-cameral, like the British, and supreme within the government. The cause is, in part, the appointive life-tenure of the Senators; but mainly the Cabinet system. As France has learned to her sorrow, that system invariably turns the Upper House into a "dignified appendage" of the Lower. The competence of the Canadian Legislature is defined negatively. It may exercise any power not expressly reserved to the British Empire or granted to the provinces. Therefore, not the States, as elsewhere, but the central government, is the residuary legatee of power. Peace, War and Foreign Affairs in general, are reserved to the Empire. Section 92 of the Constitution enumerates sixteen classes of subjects granted exclusively to the provinces, and Section 93 adds another—education—subject only to certain restrictions, designed to protect the minority sect. All other subjects fall within Dominion competence. Of these, Section 91 names, as samples, twenty-nine classes, including criminal law and procedure,

* Constitution of the German Empire, Art. 35 and 70.

militia, divorce, general rules as to marriage, and "the raising of money by any mode or system of taxation." The provinces, on the contrary, are limited to the income from lands, etc., licenses, direct taxes and Dominion subsidies. The latter now amount to one million pounds per annum. This financial dependence is the most dangerous feature of the Constitution. It robs the one side of independence, and the other side of power for good, though not for evil; it begets extravagance and corruption in the provinces—as recent boodling revelations abundantly prove—and a sectional scramble for spoils in the Dominion House. It replaces independence by dependence, that is, strikes at the very vitals of the Federal system.

The Swiss Legislature, or Federal Assembly, is a unit composed of two sections. Acting as a unit, it judges, pardons, and elects the Executive, Judges, Chancellor and Generals. It therefore *is* the government; other departments are its ministers. It legislates as two Houses, equal in initiative and power; the *Nationalrath* representing the people collectively, the *Ständerath* as States. Both are uninstructed, hence truly representative. As a legislature it thus conforms exactly to the Federal principle. But the Ständerath is weak in practice, because the mode of election and term of office of the members vary indefinitely. It therefore cannot perform the proper function of a Federal Upper House, hence, may decay and disappear. The Cantons possess all residual powers; the central government only those expressly delegated. The latter cover the ordinary subjects, also marriage, political rights, personal liberty and a guarantee of Cantonal territory and constitutions. On some other subjects the Houses legislate while the Cantons administer.

The central revenue comes from Federal property and institutions, customs, the gun-powder monopoly, one-half the gross tax on military exemptions and Cantonal contributions. One-half of the exemption tax and all the liquor tax go to

the Cantons; Uri, Grisons, Ticino and Valais receiving in addition 530,000 francs per annum. The demand of 30,000 voters, or eight Cantons, compels the plebiscite on laws or general resolutions. Amendments may pass: (1) as ordinary legislation, ratified by Referendum; (2) if the Houses disagree on amendment, or 50,000 voters demand revision, the question of revision is put to the people. If carried, new Houses are elected and the amendments submitted to the Referendum. A majority of votes and Cantons is always required for adoption.

The Swiss Legislature is thus somewhat anomalous. Its supremacy in the government would destroy Federalism in any country but Switzerland, and in Switzerland but for the Referendum. The decadence of the Ständerath, financial interdependence of Cantons and government, and legislative dependence on the one side and administrative on the other, all violate the Federal principle.

Both branches of the American Legislature are uninstructed, that is, representative. One represents the people collectively, the other as States. The direct election, short term, and complete biennial renewal of the House make it the radical, propulsive power; while the indirect election, long term, and continuity of the Senate fit it admirably to serve as the balance wheel of the system. The one is common to all the world; the other peculiar to America. Hence it is that while the House receives scant respect abroad, statesmen and publicists everywhere envy us our Senate. After the Supreme Court, it is the most characteristic American creation; and to change its election to direct, as is sometimes proposed, would be to destroy the "sheet anchor of the Constitution." Like the German Upper House, the Senate also has important administrative and judicial functions. These have increased its power, but not equally its usefulness, and the function of confirmation were better placed elsewhere. The American Legislature, unlike the Swiss, is not the government, but only a part of it. As the

State is Federal, so the government is co-ordinate. Both facts are applications of the same principle and are mutually complementary. A centralized government is inconsistent with a Federal State; it ultimately means a centralized State.

The competence of the legislature is confined to powers delegated expressly, or by necessary implication. These include only subjects absolutely demanding uniform action. Perhaps others might well be added, as marriage and divorce; but the exact extent of central competence is less important than the principle governing its relation to the States. Herein lies America's greatest contribution to the world, the most important and far-reaching political principle of modern times: viz., the direct action of the central government on the individual citizen. Its discovery and application by the Constitutional Convention was a pivotal event in the world's history. With it, Federalism sprang forth full armed and set out upon a career of world conquest. It made possible what had always been impossible—internal freedom and external power, local self-government and central national government—in short, States at once vast, complex and free. Its adoption called forth a genuine central government, complete in all its departments; decreeing, judging and executing its decrees and judgments by the hands of its own officers. It made the government and the States absolutely independent and indestructible as regards each other. In this new system, the keystone was the substitution of taxation for requisitions on the States. On this proposition the fight raged, especially in the New York Convention. Its rejection would have meant the collapse of the whole arch. Any dependence of the government on the States, or the States on the government, is a violation of the Federal principle; financial dependence is its destruction.

Amendments to the Constitution become law here, as in Germany and Switzerland, by decree of the sovereign

Federal State, expressed by the people: (1) taken collectively; (2) as States; the one decision being spoken by a certain majority of Congress; the other of the States. The participation of two Houses in the one decision and the exceptional majorities required for both, make our Constitution extremely conservative, but do not alter the principle.

This discussion reveals the following violations of the Federal principle:

1. The Upper House { *De facto* non-existent, in Canada. / Weak in Switzerland. / Instructed in Germany.

2. The government centralized, in Canada and Switzerland.

3. Dependence.

(*a*) of the government on the States for money and administration—in Germany and Switzerland.

(*b*) of the States on the government—for money, in Canada; for money and legislation, in Germany and Switzerland.

The German Legislature is thus the most faulty; the Canadian the next; the Swiss third; and the American least of all. As the American is the first, so it is also the most typical Federal Legislature.

II. EXECUTIVE.—Passing now to the executive department, logically the next in order, the States will be taken up in turn as before.

The German Executive is hereditary as to choice, but like the legislature, constitutional as to origin; hence, equally the creature of the State. He controls peace and war and foreign affairs, declares martial law, commands the army and navy, appoints and dismisses all high officers, civil and military; calls, prorogues, and with the consent of the Bundesrath dissolves the Reichstag; transmits all matters from the Upper to the Lower House, and promulgates all laws, attaching the formal word of command. Administrative decrees—a relic of barbarism—issue from the

Bundesrath, but their execution rests with the Emperor. He names and removes the Chancellor, who is responsible as an officer, but not as a Premier; that is, an adverse vote does not force his resignation. Therefore, the Emperor is not a nominal Parliamentary, but a powerful Presidential executive; possessed, moreover, of a leadership in legislation through a ministry in the House. The chief defect is his hereditary tenure. Only while able and popular can he avoid a clash with the elective elements in the system.

The Canadian Executive is nominally the Queen—*i.e.*, the Imperial Premier; and an occasional Imperial veto, reminds the Canadians of their dependence. But actually, the Queen's representative, the Governor-General, is as much a nullity in Canada as the Queen in England. He serves merely as a dignified mouth-piece for the party in power. The real Executive is the Premier, the leader of the dominant party in the House. Therefore the Canadian Legislature, even more than the Swiss, is the government. It not only creates the Executive, but can remove him any moment. Backed by the House, he appoints and removes Senators, Judges, and Lieutenant-Governors of the provinces; commands the militia; has a veto on any provincial law—a power exercised some fifty times—dissolves or prorogues the legislature; and has the exclusive power to originate money bills and to pardon offenders. Such centralized power and blending of functions is incompatible with the continued existence of Federalism. In particular, the central veto on provincial legislation absolutely nullifies the whole system; while that exists, Canada is not Federal except in name. Fortunately, the desperateness of the disease is working its own cure. The veto power has become too dangerous to use, and is quietly passing into the limbo of doctrinaire inventions.

The Swiss Executive is a council of seven, elected for three years by the Assembly and irremovable during that time. Its members represent all parties, and have a voice

but no vote in the Houses. Its competence covers :—leadership in legislation, some judicial cases, foreign affairs, the execution of laws and of Supreme Court decisions, guarantee of Cantonal Constitutions, and the calling out of 2000 troops for three weeks, provided the legislature is not sitting. For the most part, the Council orders—the Cantons execute. If they disobey, it can only quarter troops at their expense, or withhold Federal subsidies. It is thus a Cabinet with only a nominal chief, no Parliamentary responsibility, and little power to compel obedience. Such an anomaly would not last over night anywhere else. It suggests a Board of Trustees rather than a government.

The American Executive is in fact as in name, presidential. He is independent of the legislature both in origin and tenure, and his Cabinet is a body of chief clerks instead of Parliamentary ministers. His appointive and legislative functions have almost equally subserved his power, but not his usefulness. Civil Service Reform means the curtailment of the one; hence the question arises, shall his legislative power nevertheless remain merely negative? Or shall it be made positive, in order to protect his influence and remedy present evils in legislation? A comparison of executives may answer this question.

The American Executive is chosen by the people for a definite term, hence is independent; master both of himself and his policy. The Canadian Executive is chosen by the legislature and is removable at pleasure, hence veers with every popular caprice or passion, and necessarily sacrifices everything to one object—the retention of office.

So far the American profits by the comparison. But as regards legislation, the case is reversed. In Canada, the Cabinet leads legislation and is responsible; in Congress, nobody leads and nobody is responsible. Even the Speaker, the real leader of the dominant party, can affect legislation only through the appointment of committees. The result is more and poorer laws than afflict any other civilized country.

Thus neither Cabinet nor Presidential system is perfect. But might not a combination unite the advantages and avoid the disadvantages of both? Certainly: such is the German. The Executive is independent, hence Presidential; his minister, appointed and removed by him alone, nevertheless has a seat and voice in the Legislature. The departments are not blended, yet the Executive can lead legislation. Instead of merely negative power, as in the United States, he has a positive influence. The German Chancellor is therefore a new, a veritable "*bahnbrechend*" creation; Germany's greatest contribution to politics. Given an elective President, and such a minister or ministers, and the Federal Executive of the future—if prophecy be allowable—would be attained.

III. JUDICIARY.—The Judiciary remains for consideration. In Germany, the courts are State tribunals, except one, although they are organized by and mainly apply Imperial law. All alike are statutory, not constitutional; and just as a stream cannot rise higher than its source, so the courts cannot rise above the legislative or executive interpretation of the Constitution. They may annul a State law, if unconstitutional, but an Imperial law they cannot question. Therefore they cannot restrain unconstitutional acts of the government, or defend the victims of its injustice; the government is final judge of its own actions. It is therefore tyrannical in principle if not in practice; personal liberty is a farce. The States, on the other hand, are collectively—through the Bundesrath—given jurisdiction of political cases involving a State. The defence of the Constitution is thus committed to the hands of its natural enemies—the State governments; and the only remedy at their disposal, Federal execution, is so summary as to insure its non-application. Individuals are left defenceless; the States are made judge in their own case. Nor is this all. Who decides whether a proposed law changes the Constitution? A majority of the Bundesrath? Then the "less than fourteen" clause is

a dead letter. The majority can pass any law by declaring it constitutional. Or perhaps the fourteen decide? Then the legislative power of the rest is annulled. The fourteen can defeat any law by declaring it unconstitutional. Or finally, perhaps the Emperor decides by virtue of his power to promulgate law? Then both Houses become merely ornamental. The Emperor can absolutely veto any bill by first casting the Prussian vote in the negative, then refusing, on the ground of unconstitutionality, to promulgate the law. The construction of the German Judiciary is thus gravely defective. It defeats the chief end of Federalism by not guarding individual freedom. It violates the first principle of Federalism, equally through a theoretic coërcion of the States by the central government, and an actual permit to the States to usurp with impunity. And it endangers the permanence of Federalism by providing no definite body to finally interpret the Constitution. These evils, springing from a common source—the statutory origin of the courts—mark out the German Judiciary as theoretically the most unsound and practically the most unworkable part of the system.

The Canadian Federal Judiciary comprises the Maritime, the Exchequer and the Supreme Court; an appeal lying *Reginæ Gratia* to the Judicial Committee of the English Privy Council. The Judiciary is constitutional, not statutory; created by the Sovereign State, not the central government. Hence, though a veto on provincial acts was given the central government, avowedly in order to prevent the Judiciary interpreting the Constitution, the attempt was vain. It contravened the nature of a Federal State. The courts now pass upon the constitutionality of acts, both provincial and Dominion, and their decision is final. The executive veto is *de facto* obsolete; the judicial decree is supreme. Thus is independence established between provinces and government, and Federalism made a reality.

The Swiss Judiciary has a similar history. The Constitution of 1849 subordinated the court to the central government, and referred all cases involving public law to the Assembly. For the Swiss, like Europeans in general, dreaded the supremacy of the Judiciary in the Constitution. But the logic of facts was too strong for them. A State cannot remain partly Federal, partly not. It must move, if not forward, then backward. The Swiss chose to go forward, hence the revision of 1874 immensely strengthened the Judiciary. The Federal or Supreme Court now has jurisdiction over—

1. Civil cases involving the central government, a Canton, or both.

2. Political crimes against the government or the law of nations.

3. Conflicts of jurisdiction between the government and a Canton, or between Cantons.

4. Violations of constitutional or treaty rights of individuals. But administrative cases—including those arising from the militia, religion, education, taxation, elections, patents, etc., are heard by the Federal Council, from which an appeal lies to the Federal Assembly. This body also decides conflicts of jurisdiction between the different Federal authorities; hence the court is not final judge of its own competence. And finally, it cannot interpret the Constitution, but only apply Federal law; hence cannot declare the latter unconstitutional.

These are grave defects; but the tendency is toward remedying them. The jurisdiction of the Court is widening every day. The Legislature, moreover, now delegates to the Court power to interpret the Constitution in deciding conflicts between Federal and Cantonal authorities. This is a great gain. It shows that the people are learning to prefer the judicial to the legislative interpretation of law. Another revision would probably make the court judge of its own competence and the

supreme interpreter of the Constitution and laws — but for the Referendum. Through that, the people either tacitly or expressly ratify all laws; and as a court in overturning a legislative enactment necessarily appeals to the higher law of the Constitution, *i. e.*, the command of the sovereign people, it can find no ground to stand on when every legislative enactment is ratified by the people, hence, seems to become equally their sovereign command. But we must distinguish between the sovereign people, who decree the Constitution, and the same people acting as the organ of their own sovereignty in accordance with the Constitution. For otherwise, every law would be equally a constitution; no one could take precedence over others. Now the court appeals to the people only in the former sense—as sovereign decreeing the Constitution, not as organ of sovereignty under the Constitution—because in the latter sense, the people are merely co-ordinate in origin and authority with the court. Therefore the court, resting upon the Constitution, may declare unconstitutional a legislative enactment, even though ratified by the people acting as a third legislative chamber. The application of this principle in Switzerland will go far toward completing her Federal system.

The American Judiciary is the most independent and powerful in the world. The Supreme Court, in particular, is both constitutional as to origin, and the judge of its own competence. To it is committed the Ark of the Constitution, and its decisions announce the nullity of all laws which contravene that Supreme Law. Great resistance may override its decrees, unless supported by the Executive, but as it forms the keystone of our whole system the people sooner or later compel the political departments to uphold its decisions. The American Supreme Court is, therefore, without precedent in history.

This comparison of judiciaries discloses two types, and two approximations to a type. The German is one type; the American, the other; and the Swiss and Canadian

are successive stages in the progress from the German to the American. Germany has retained the simple State judiciary; America has perfected the Federal judiciary; the former remaining a government bureau, the latter becoming an organ of the State.

The real meaning of this difference is that functions united in America are divided elsewhere. The American court interprets both public and private law; the German only private law. This necessitates some other organ for public law. For a State is not legally present except when acting; *i. e.*, ordaining or amending the Constitution; therefore, every Federal State must perforce empower some organ to act as its immediate representative, to speak the final word of command. Otherwise the governmental machinery would not run a week. Its very complication demands a controlling hand always present, and as the sovereign is legally absent, a substitute must be appointed to interpret and enforce the meaning of the State as expressed in the Constitution. Whatever organ discharges this function is in so far a new organ. For the time being, it stands clothed in all the majesty of the State and pronounces in its name sovereign decrees before which all, high and low, governors and governed, must alike bow.

The States under consideration, therefore, differ, not as to the existence of this power, but as to its bearer. In Germany it is entrusted to the collective State governments, the natural champions of particularism; in Switzerland to the central Legislature, the natural champion of centralism; in Canada mainly, and in the United States entirely, to the Supreme Court, the natural champion of the law and the Constitution. The two former not only bestow a sacred judicial function upon partisan political bodies, but destroy that *sine qua non* of Federalism—absolute independence of government and States. The American plan, on the contrary, conserves the Federal principle in that it makes neither States nor government supreme. For the Court, as

the highest interpreter of the Constitution, is part of the government as little as of the States; it towers equally above both. It is a great tribunal, legal in training, dispassionate by habit, law-reverencing by nature, placed aloof from political storms, charged to confine government and States within their legal spheres, to interpret the law, to guard the Constitution, to do justice. Such functions must be discharged by a judicial body or become a mockery. Therefore, other things being equal, a Federal State is perfect in proportion as the judiciary is supreme. America's noblest and most characteristic creation is her great Supreme Court.

Thus, a study of the Federal State naturally closes with the judiciary, the keystone of the system. It only remains, therefore, briefly to summarize the results obtained.

III. SUMMARY.

The Federal State is the latest and only successful attempt to unite liberty and order. The ancient cities secured neither liberty nor order; the Roman Empire secured order, but not liberty; Feudalism, liberty, but not order; Centralism, order and national, but not individual liberty; Federalism secures both order and liberty—national, local, minority and individual. It is therefore a new political equilibrium.

States, *i. e.*, peoples, may create a Federal State by self-abnegation, by renunciation of their separate sovereignties in favor of the collective State formed by their union; but once in existence, a State is a State, no matter how it became so; its will is law, and all resistance thereto is rebellion.

The Federal State is the one sovereign people. They decree and amend the Constitution. Therein they create co-ordinate agents, the States and the central government, delegating to each the exercise of certain powers. The States are the embodiment of the centrifugal principle; the government of the centripetal. This is the new equilibrium.

Its maintenance demands the absolute independence of government and States as regards each other, and this demands their absolute subjection to the Federal State through the Constitution. Therefore:

1. Power should be divided; as the State is Federal, the government should be co-ordinated; the Legislature bicameral, uninstructed, one House elected directly for a short term and renewed at each election, the other House elected indirectly, for a long term, and continuous; the Executive presidential, independent of the legislature in origin and tenure, elective, and able to lead in legislation through a minister responsible only to himself.

2. Both the government and the States must be amenable to a higher power; their subjection to the State through the Constitution must be enforced. Therefore, the State must appoint a supreme arbitrator to decide in its name all conflicting claims of competence, and to confine both States and government to their constitutional limits; in short, to interpret and maintain the Constitution. This is the function of the Supreme Court. To entrust this power to government or States is to make them judge in their own case.

3. Neither government nor States must be the exclusive organ through which the Federal State decrees amendments. That would subject the one to the other. Therefore, the agreement of both must be necessary; the government to guard against decentralization, the States against centralization.

The Federal State is thus alone truly stable, because it alone is built upon the eternal rock of natural law; it alone harmonizes and combines the two opposite yet indestructible forces, whose action and reaction fill and move the universe.

Respublica fœderata maximus temporis partus.

E. V. ROBINSON.

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